No. 88-2093

(2)

Supreme Court, U.S.
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IN THE
Supreme Court of the United States
OCTOBER TERM, 1989

RICHARDSON ENGINEERING COMPANY,
Petitioner,

v.

WILLIAM L. CROW CONSTRUCTION COMPANY,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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BRIEF OF RESPONDENT IN OPPOSITION

KAREN CALE LOCKWOOD
WICKENS, KOCHES & CALE
818 Connecticut Avenue, N.W.
Suite 1100
Washington, D.C. 20006
(202) 775-2400
Counsel for Respondent

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

15pp.

PARTIES TO THE PROCEEDING BELOW

Appellant: Richardson Engineering Company

Appellee: William L. Crow Construction Co.

Rule 28.1 Listing

William L. Crow Construction Co. is a wholly owned subsidiary of J.A. Jones Construction Co., and its immediate parents, Jones Group, Inc., and Philipp Holzmann USA, Inc., none of which is publicly traded. Their parent company is:

Philipp Holzmann A.G.

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BRIEF OF RESPONDENT IN OPPOSITION

Respondent William L. Crow Construction Co. ("Crow") respectfully opposes the petition for a writ of certiorari filed with the Court by Richardson Engineering Company ("Richardson") on June 26, 1989.

OPINIONS BELOW

The 35-page opinion and order of the district court granting summary judgment for Crow is unreported, and is reprinted in the Lodging filed by the Petitioner at L1.

The summary order of the United States Court of Appeals for the Second Circuit, filed on February 3, 1989, is unreported. It is reprinted in the appendix to the Petition at Pet. App. 3a-5a.

The court of appeals' denial of the petition for rehearing and declination of the *en banc* suggestion, filed on March 28, 1989, is also unreported. The denial is reprinted in the appendix to the Petition at Pet. App. 1a-2a.

STATEMENT

This petition arises from a garden-variety contract dispute between a subcontractor, Richardson, and a general contractor, Crow, on an express written contract for the construction of a semiconductor manufacturing plant in Burlington, Vermont (the "Vermont job"). On January 5, 1981, before the job was completed, Richardson was terminated for breach of contract. Because of its disastrous financial condition, it had defaulted, became insolvent, and was unable to perform.

To receive the subcontract, Richardson had been required to provide a current financial statement to Crow. Harry Richardson, its president and majority shareholder, admitted in discovery, however, that the net worth and net income reported to Crow were both more than ten times as much as Richardson reported to the IRS for the same date. Worse yet, while Richardson reported large cash balances to Crow, the company books, disclosed in discovery, revealed that its actual cash balance was a negative $1,540,000. In short, despite express representations to the contrary, Richardson was $1.5 million in the hole before it ever stepped foot on the Vermont job.

During 1980, while on the Vermont job, Richardson's financial irregularities mounted. It bounced over 450 payroll checks. At the close of the year, it owed $1,534,569 in back federal and state employment taxes. In the middle of 1980, in an effort to create capital, Harry Richardson masterminded a check-kiting scheme that floated over $4.2 million among three banks over a period of six weeks. The company was sued on this scheme by

two banks—including one on whose board Harry Richardson sat as director.

Richardson's suppliers complained directly to Crow that Richardson was not paying them. Its largest supplier was never paid on two bounced checks totalling $211,000. Some threatened to file liens on the Vermont job; others refused to ship materials to the job until they had been paid. In late December, 1980, Crow had to advance $94,000 for Richardson's payroll.[1]

At the same time, on the Vermont job, Richardson billed Crow more than the expenses it incurred, and collected more than it spent.[2] Nevertheless, on January 2, 1981, Harry Richardson admitted to Crow that without a further advance of $1 million, Richardson would be unable to continue or complete its contract. Crow had no choice but to terminate Richardson for default.

In February, 1981, Crow filed suit to recover its cost of completing Richardson's work. Richardson filed counterclaims seeking to recover damages for alleged delays. The contract, however, contained express provisions barring every aspect of these counterclaims. Both the express written subcontract between Crow and Richardson, and the prime contract incorporated therein, provided that Richardson could not obtain damages as a result of any delays on the job. Instead, the sole remedy for any delay was agreed to be an extension of time in the completion date. Any such extension was to be determined only at the end of the job.

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[1] Despite these financial problems, Harry Richardson had interest-free loans in 1980 from the company exceeding $471,000, including $50,000 to buy a horse.

[2] Its excess cash ran as high as $1.3 million in July. At the time of termination, Richardson had received from Crow $900,811 more than it spent on the job.

On February 13, 1985, after four years of discovery, Crow moved for summary judgment on Richardson's delay-related counterclaims. Crow presented in its motion a comprehensive analysis of the undisputed state law governing the strict enforcement of no-damage for delay clauses, and set forth the facts, in clear, concrete particulars, many of them proven through the mouth of Harry Richardson himself during 22 days of deposition. Appended to the motion were the subcontract, the prime contract, and 240 pages of deposition transcript from seven witnesses, including Harry Richardson.

Ten weeks after it received Crow's motion, Richardson filed an opposition supported principally by an affidavit of Harry Richardson replete with conclusory statements and unsubstantiated charges as to Richardson's legal theories. Richardson did not file an opposing statement of contested facts, thereby admitting the facts put forth by Crow. Crow's comprehensive reply, which fully analyzed Richardson's legal theories, presented undisputed and particularized facts as to those theories.

Twenty-three months later, on January 30, 1987, after accepting additional briefing and seeking record citation for certain facts, the district court granted Crow's motion. It entered a 35-page opinion and order holding that Richardson's counterclaims were barred by the express and unambiguous terms of the written contract. [L1 to L35.] Richardson filed multiple briefs in support of a motion for reconsideration. After effectively reconsidering its order, the district court denied the motion for reconsideration in June, 1987.

In a six-week bifurcated trial beginning February 9, 1988, the jury found in the liability phase that Richardson had breached the contract by (1) failing to pay taxes, (2) becoming insolvent, (3) falsely certifying that it had paid suppliers and workers, (4) diverting job funds for other purposes, and (5) violating the lien waiver

provision. In the damages phase, Crow's verdict, netted against amounts retained by Crow and miscellaneous adjustments, together with its attorneys fees, resulted in a judgment of $2,270,930.09.

Richardson appealed to the Second Circuit. The court of appeals, two days after oral argument, unanimously affirmed the grant of summary judgment "for the reasons stated by Judge Coffrin in his careful opinion." Pet. App. at 4a. Noting that the affidavit of Harry Richardson was primarily composed of conclusory statements and unsubstantiated charges, it held that the "district court correctly assessed the motion with regard to the evidentiary burden that Richardson Engineering would have had to bear" on its legal argument, citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986). Pet. App. at 4a. The court of appeals also affirmed the exclusion of Richardson's proffered expert testimony on grounds that it was overly speculative. *Id.* at 4a-5a.

Richardson then sought a rehearing *en banc* on grounds that the panel decision departed from Second Circuit precedent. The petition for rehearing was denied, with no judge requesting that a vote be taken on the *en banc* suggestion. Pet. App. at 1a-2a.

REASONS WHY THE PETITION SHOULD NOT BE GRANTED

Richardson seeks to elevate two pedestrian procedural questions to a level worthy of review by this Court: first, whether Richardson's bare claims and wholly conclusory statements are sufficient to thwart a properly supported summary judgment motion; and second, whether a district court's exclusion of damage evidence found by that court to lack any causal relationship to the liability findings of a jury should be overturned. Richardson has identified no issue that warrants invocation of this Court's certiorari jurisdiction.

A. The Decision Below Is Wholly Consistent With This Court's Decisions In *Anderson v. Liberty Lobby, Inc.* and *Celotex Corp. v. Catrett*

In its statement of questions presented, Richardson raises the spectre of a conflict between the decisions below and this Court's rulings in *Anderson* v. *Liberty Lobby, Inc., supra,* and *Celotex Corp.* v. *Catrett,* 477 U.S. 317 (1986). But its argument is devoid of any discussion of this Court's decisions, and with good reason.

No reviewable issue is presented in this case because the Second Circuit and the district court correctly applied the precedent of this Court. *E.g., Anderson v. Liberty Lobby, Inc., supra; Celotex Corp. v. Catrett, supra.* The familiar and well-established legal standards were carefully observed by all of the courts below, and there is no reason for this Court to disturb the result reached by the district court opinion, the appellate summary affirmance, and the *en banc* declination.

This Court has confirmed that the plain language of Rule 56 "mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex, supra,* 477 U.S. at 322. "The mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no *genuine* issue of *material* fact." *Anderson, supra,* 477 U.S. at 247-48 (emphasis supplied).

The substantive law will identify which facts are material. *Id.* Opposing affidavits raise no genuine issue of fact if they do not present facts of a sufficient caliber or quantity to allow a rational finder of fact to find in an opponent's favor. *Anderson, supra,* 477 U.S. at 254. "When the moving party has carried its burden under

Rule 56(c), its opponent must do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita Electric Industrial Co.* v. *Zenith Radio Corp.*, 475 U.S. 574 (1986). "If the evidence is merely colorable, or is not significantly probative, summary judgment may be granted." *Anderson, supra*, 477 U.S. at 249-50 (citations omitted).

In this case, the district judge properly performed his function—"not himself to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." *Anderson, supra*, 477 U.S. at 249. The dismissal of Richardson's claims did not result from any misapprehension by the district judge of his function. It resulted from the fact that, as shown by his careful opinion, the judge properly applied the well-settled substantive law[3] to all of the material record facts, which remained undisputed.

This is precisely the kind of case that this Court has said Rule 56 was designed to weed out. *Celotex, supra*; *Anderson, supra*. All of the facts placed before the court by both Crow and Richardson, taken together and properly viewed through the substantive law upon which a determination of the claims would be made, demonstrated that summary judgment was mandated as a matter of law.

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[3] Richardson forgets the substantive law applicable to its claims. It forgets that its contract prohibited delay damages in clear and unambiguous terms. District Court Opinion, Pet. Lodging at L4-L5. It forgets, although it does not dispute, that Crow carried its burden to show that all of Richardson's delay-related claims were within the ambit of those contract terms barring damages. It ignores the abundant undisputed caselaw that such no-damage clauses are enforceable against claims precisely like Richardson's. *Id.* at L21-L32. It never acknowledges the high substantive standards for proving waiver or repudiation of express contract terms and for demonstrating the limited exceptions to such no-damage clauses.

B. Contrary To Petitioner's Suggestion, There Is No Conflict Within The Second Circuit

In an effort to create a conflict among the circuits, Richardson claims that there is a conflict *within* the Second Circuit. No issue warranting review by this Court is presented.

Richardson's argument that the Second Circuit failed to follow its own precedent is wrong. This case is entirely consistent with applicable precedent within the Second Circuit. *E.g., Murray v. Xerox Corp.*, 811 F.2d 118, 121-23 (2d Cir. 1987); *Wyler v. United States*, 725 F.2d 156, 160 (2d Cir. 1983); *Beal* v. *Lindsay*, 468 F.2d 287, 291 (2d Cir. 1972).[4]

And when given the opportunity to resolve the purported conflict, not one judge in the Second Circuit asked that a vote be taken on the *en banc* suggestion. Plainly, the Second Circuit decision here is in line with its own precedent as well as that of this Court.

C. There Is No Conflict Among The Circuits On The Exclusion Of Expert Testimony Such As That Proffered By Richardson

Richardson also implores this Court to review the exclusion of testimony by Richardson's damage expert. This question is not worthy of review. The jury found only a

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[4] Richardson's quotation of a long introductory passage from *Donahue v. Windsor Locks Board of Fire Commissioners*, 834 F.2d 54 (2d Cir. 1987), merely reciting the general principles governing summary judgment, does nothing to enlighten Richardson's position in this case. The circumstances of *Donahue* bear no resemblance to Richardson's case. In *Donahue*, a section 1983 suit, the court had before it abundant facts, including deposition testimony, threatening letters, formal complaints and reprimands, and meeting minutes, which were relevant to whether there was a fire-house conspiracy to deprive plaintiff of his first amendment rights. Richardson's legal theories are inapposite, and Richardson suffers from lack of facts.

limited oral contract relating to the cost of certain work performed under change orders. Yet the proffered expert's damage study report and voir dire examination made plain that his estimates irretrievably lumped together a variety of factors which were not even covered by the limited oral contract.

There is no split among the circuits on the inadmissibility of such expert testimony. It is uniformly held that damage evidence must establish at a minimum a causal nexus between the alleged breach and the alleged damages and must provide a reasoned, non-speculative basis for apportioning the damages among the actionable and non-actionable factors. *E.g., Lichter v. Mellon-Stuart Co.*, 305 F.2d 216 (3rd Cir. 1962).[5]

It adds nothing to Richardson's effort to fabricate a conflict among circuits for Richardson to compare this case with *U.S. Industries v. Blake Construction Co.*, 671 F.2d 539 (D.C. Cir. 1982). The fact that this same man testified before another federal court in a different case for a different client on a different job under a different contract does not present any conflict between the circuits.

Evidentiary objections are committed to the sound discretion of the trial court. *E.g. City of New York v. Pullman, Inc.*, 662 F.2d 910, 915 (2d Cir. 1981), *cert. denied*, 454 U.S. 1164 (1982). With a thorough understanding of the proffered expert's method and all of the testimony in the case, the trial judge properly found that the damage testimony was too speculative to be admitted.

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[5] *Accord, S.J. Groves & Sons Co. v. Warner Co.*, 576 F.2d 524, 527 (3rd Cir. 1978); *United States v. J.H. Copeland & Sons*, 568 F.2d 1159, 1162 (5th Cir.), *cert. denied*, 436 U.S. 957 (1978); *Boyajian v. United States*, 423 F.2d 1231, 1235 (Ct. Cl. 1970); *United States v. Citizens & Southern Nat. Bank*, 367 F.2d 473 (4th Cir. 1966).

CONCLUSION

For the foregoing reasons, this Court should deny the petitioner a writ of certiorari to the United States Court of Appeals for the Second Circuit.

Respectfully submitted,

KAREN CALE LOCKWOOD
WICKENS, KOCHES & CALE
818 Connecticut Avenue, N.W.
Suite 1100
Washington, D.C. 20006
(202) 775-2400
Counsel for Respondent

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